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REMEDIES AS A CAPSTONE EXPERIENCE: HOW THE REMEDIES COURSE CAN HELP ADDRESS THE CHALLENGES FACING LEGAL EDUCATION

MICHAEL P. ALLEN*

INTRODUCTION

Legal education is under extensive scrutiny these days; indeed, one might even say it is under attack. The *New York Times* has warned that “American legal education is in crisis.”¹ Claims are made that law schools are not doing the job they are meant to do: train the next generation of lawyers. These assertions have come from the media,² businesses who use legal services (i.e., clients),³ as well as legal academics themselves.⁴ Representative of this type of criticism is this statement from a recent newspaper article: “Law schools have long emphasized the theoretical over the useful, with classes that are often overstuffed with antiquated distinctions, like the variety of property law in post-feudal England. Professors are rewarded for chin-stroking scholarship”⁵

* Professor of Law, Associate Dean for Faculty Development and Strategic Initiatives, and Director, Veterans Law Institute, Stetson University College of Law; B.A., 1989 University of Rochester; J.D., 1992 Columbia University School of Law. I extend my thanks to all the students whom I have taught in Remedies over the years. My thanks also to the *Saint Louis University Law Journal* for the invitation to participate in this symposium on Teaching Remedies.

1. Editorial, *Legal Education Reform: The Economic Downturn Is Forcing Overdue Changes in Training for Lawyers*, N.Y. TIMES, Nov. 26, 2011, at A18.

2. See, e.g., David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 9, 2011, at BU1; David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, at BU1; David Segal, *The Price to Play Its Way*, N.Y. TIMES, Dec. 18, 2011, at BU1; David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1 [hereinafter Segal, *What They Don't Teach*]. As should be apparent by this point, Mr. Segal is in some respects leading the media criticism of American legal education. And this is not an exhaustive list of his reporting on this topic.

3. One general counsel of a company in the oil industry was reported to have said: “The fundamental issue is that law schools are producing people who are not capable of being counselors.” Segal, *What They Don't Teach*, *supra* note 2 (quoting the general counsel of Houston-based FMC Technologies). He continued: “They are lawyers in the sense that they have law degrees, but they aren't ready to be a provider of services.” *Id.*

4. See, e.g., BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* ix–xiii (2012).

5. Segal, *What They Don't Teach*, *supra* note 2.

This recent wave of criticism did not come entirely as a surprise to many in legal education. Within the past several years there were two significant studies published addressing perceived deficiencies in legal education, one study produced through the Carnegie Foundation for the Advancement of Teaching⁶ and the other growing out of efforts of the Clinical Legal Education Association (“CLEA”).⁷ While these studies differ from one another and most certainly approach matters from a perspective less overtly critical to legal education than the recent newspaper articles, both the Carnegie study and the CLEA study in their own ways call upon law teachers to consider how they teach and what their goals are for shaping the next generation of lawyers.

Whether or not the criticisms of late are justified in whole or in part, or whether the exhortations of Carnegie and the CLEA are on the mark, those of us in legal education have to take these matters seriously. We may take them seriously because we intend to engage in some form of rebuttal explaining why legal education is not dysfunctional. Or perhaps we will take them seriously because we come to believe that there is some truth at least in the picture that has been painted. Whatever the reason, the one certainty is that we cannot bury our heads in the sand and pretend that legal education can simply proceed as if no one had ever raised the issues on the table.

Reinforcing the point that the “ostrich option” is not available to us,⁸ the American Bar Association (“ABA”) has most certainly taken the criticisms of legal education seriously. The ABA’s Section of Legal Education and Admissions to the Bar is the national accrediting body for American law schools.⁹ In that role, the organization promulgates the standards under which it determines whether law schools are of sufficient quality for a number of purposes.¹⁰ As discussed below, whether in direct response to some of the criticisms of law school education or not, the ABA has promulgated certain proposed new standards for accreditation that will require that law schools take

6. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

7. ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (2007).

8. As an aside, I should note that the belief that an ostrich actually buries its head in the sand when confronted with a challenging situation appears to be fiction. *See, e.g., Fact or Fiction*, AM. OSTRICH ASS’N, <http://www.ostriches.org/factor.html#head> (last visited Dec. 19, 2012).

9. *Accreditation in the United States*, U.S. DEPARTMENT EDUC., http://www2.ed.gov/admins/finaid/accred/accreditation_pg7.html#law (last visited Dec. 19, 2012); *see also* 34 C.F.R. § 602 (2011) (setting forth regulations governing accrediting agency recognition process and requirements). While the Section is an independent body from the ABA for accreditation purposes, I will generally refer to the body as the “ABA” in this Essay.

10. *See* AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *THE LAW SCHOOL ACCREDITATION PROCESS* 3 (2010), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2012_accreditation_brochure_web.authcheckdam.pdf.

seriously many of the claims that legal education is out of touch with the practice of law.¹¹ In other words, no matter how one cuts it, those of us in legal education are in for an interesting time over the next few years as we collectively work to address the substance of the criticisms leveled at our profession.

The reader could be forgiven at this point for wondering what any of this has to do with the focus of this symposium: Teaching Remedies. The basic thesis of this Essay is that the Remedies course, and how we teach it, can be an important part of how law schools respond to both the criticisms of legal education generally as well as the more specific accreditation requirements the ABA may soon impose. Those of us who teach Remedies can—and should—be at the forefront of our institutions' responses to these central challenges to our system of legal education.

The reason why the Remedies course can be so significant at this time is that it provides a means by which law schools can assess whether our students have achieved the level of knowledge, skills, and values we expect them to possess when they leave our institutions. It is for this reason that I have described the course as being a “capstone” experience.

There are many ways to define a “capstone” in terms of an educational experience. For present purposes, I see a “capstone” experience in education as being the equivalent of the dictionary definition of the term. It is the “crowning or final stroke” of a student’s educational experience.¹² Thus, a true capstone experience will be a means by which those of us in legal education can provide a way in which our students can bring together what we have taught them over their time in law school. And it will simultaneously provide the means by which we can assess whether we have, in fact, succeeded.

It is not sufficient to state that Remedies, or any other course or device, is the means by which to measure educational success. We must first consciously determine what our criteria for success are. In other words, what are the knowledge, skills, and values that reflect that a student has achieved what is necessary to be a lawyer? While different institutions will likely identify varied traits students should possess when they leave our hallowed grounds, whatever those traits may be, Remedies provides an excellent means by which to measure our success. And to the extent that we identify abilities that address the current criticisms concerning the ability to truly practice law, Remedies may be an even more desirable assessment device than others.

This Essay proceeds as follows. In Section I, I describe the educational environment in which we find ourselves. Specifically, I describe the ABA standards that are likely to come into effect soon concerning legal education

11. *See infra* Section I.

12. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 201 (William Morris ed., 1981).

and how those standards are, at least in part, meant to address the claim that law schools are not preparing lawyers for the practice of law. I also discuss in this Section how a properly constructed capstone experience is an excellent means of complying with the ABA standards and of addressing the criticisms leveled at American legal education more generally. In Section II, I turn to Remedies in particular. Here, I describe how the Remedies course is a wonderful capstone experience that should consciously be utilized for that purpose in the law school curriculum. Finally, I end with a brief conclusion.

I. THE EDUCATIONAL ENVIRONMENT AND THE ROLE OF CAPSTONES

While the recent media criticisms of legal education and the impending ABA changes to accreditation standards are independent developments, these developments both help set the boundaries of the educational environment in which we find ourselves. Moreover, the two developments have certain connections related to the way in which we teach our students and ensure that our graduates have achieved what we hoped for them. In this Section, I discuss this educational environment in a bit more detail than I did above. This discussion helps set the stage for why the Remedies course can serve as a capstone experience.

Let's begin by returning to the ABA. The ABA is currently in the midst of revising Chapter 3 of the *Standards and Rules of Procedure for the Approval of Law Schools*.¹³ Chapter 3 deals with the "Program of Legal Education" at American law schools,¹⁴ in other words the core of what a law school is all about. Having a working understanding of what the revisions to Chapter 3 are likely to entail is important when considering the role the Remedies course can play in the law school curriculum.

13. The initial revisions to Chapter 3 are being addressed by the Standards Review Committee of the ABA's Section of Legal Education and Admissions to the Bar. That committee is "charged with reviewing proposed changes in or additions to Standards, Interpretations, Rules, Policies, Procedures, and Criteria." *Standards Review Committee*, A.B.A., www.americanbar.org/groups/legal_education/committees/standards_review.html (last visited Dec. 19, 2012) (setting forth committee's role). As of the preparation of this Essay, the Committee's most recent meeting in which Chapter 3 was discussed was held in July 2012. *See* Am. Bar Ass'n Section of Legal Educ. & Admissions to the Bar, SRC July '12 Meeting Materials 1 (July 13–14, 2012), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/July2012/201207_src_meeting_materials.authcheckdam.pdf [hereinafter July 2012 Draft]. All references in this Essay to proposed provisions of Chapter 3 are to the July 2012 draft that is a part of this document. I will refer to it herein as the "July 2012 Draft," preceded where necessary by the appropriate standard or interpretation number.

14. The 2012–2013 version of the *Standards* is available on the website of the ABA's Section of Legal Education and Admissions to the Bar. *See* AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2012), *available at* http://www.americanbar.org/groups/legal_education/resources/standards.html.

The central notion behind the proposed changes to Chapter 3 of the *Standards* is quite simple. First, law schools should consciously determine what they want students to know when they have completed their law school journey. This is what one can refer to as identifying “learning outcomes,” the subject of Proposed Standard 302.¹⁵ The fundamental idea is that a law school cannot determine whether it has been successful in forming new lawyers if it has not considered what knowledge, skills, and values it wants such new lawyers to possess.¹⁶

It is at this stage of the process that the ABA’s activities intersect with some of the recent media criticisms. At their heart, the criticisms are that law schools are not doing what they need to do in order to produce lawyers.¹⁷ Of course, one cannot make this point—or refute it—without at least implicitly having determined what are one’s desired learning outcomes. A comprehensive discussion of this point is certainly beyond the scope of this Essay. In many respects, such a discussion is at the center of the debate about what law schools are and should be. For present purposes, Proposed Standard 302 and associated Proposed Interpretation 302–1¹⁸ provide a sufficient general description of learning outcomes that I have categorized as follows: (1)

15. July 2012 Draft, *supra* note 13, at 14. The current version of Proposed Standard 302 provides as follows:

A law school shall identify and publish the learning outcomes it seeks to achieve for its students. The learning outcomes shall, at a minimum, include competency to represent clients as an entry-level practitioner in the following areas:

- (1) Knowledge and understanding of substantive and procedural law;
- (2) Legal analysis and reasoning, legal research, problem solving, and written and oral communication in the legal context;
- (3) Exercise of proper professional and ethical responsibilities to clients and the legal system;
- (4) Other professional skills needed for competent and ethical participation as a member of the legal profession; and
- (5) Any other learning outcomes deemed by the school as important or necessary to meet the needs of its students and to accomplish its mission.

Id.

16. There is widespread agreement among those who study legal education that the identification of learning outcomes is a critical part of the educational process. *See, e.g.,* STUCKEY ET AL., *supra* note 7, at 39–91.

17. *See supra* notes 1–4 and accompanying text.

18. Proposed Interpretation 302–1 provides:

For the purposes of this Standard, a law school shall determine in which other professional skills its graduating students shall have competency, in a way that fulfills the mission of and uses effectively the strengths and resources available to the law school. Other professional skills include the following: interviewing, counseling, negotiation, fact development and analysis, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation.

July 2012 Draft, *supra* note 13, at 14.

possessing certain substantive knowledge about the law; (2) having core abilities concerning legal communication and analysis; (3) attaining the practical skills necessary to advise and represent clients, particularly including the ability to identify and present solutions to problems; and (4) appreciating the important role of lawyers and the law in our system of justice and society more broadly.¹⁹

After identifying the desired learning outcomes, the next part of the proposed ABA Standards in Chapter 3 would ensure that the law school has developed a curriculum that matches those outcomes.²⁰ This point makes complete sense because a law school's curriculum should be tied to achieving its goals. Thinking about such goals (or learning outcomes) when designing the program of instruction is a natural exercise and one that is likely to be required as part of law school accreditation.

Developing goals and setting a curriculum to meet those goals is critically important. Equally so is ensuring that the curricular design actually achieves the goals. This can generically be considered as assessment.²¹ Not surprisingly, the proposed ABA Standards require such assessment. This assessment is accomplished on two levels. First, Proposed Standard 307 focuses principally on assessment at the level of an individual student. It requires that a law school use both "formative and summative assessment methods" in order "to measure and improve student learning and provide meaningful feedback to students."²²

19. No doubt, there is no single means by which these learning outcomes should be categorized. The four groupings I have set forth in the text above are based on the various formulations in the proposed ABA standards. They are also meant to be sufficiently general to avoid disagreements that will necessarily flow from more specific descriptions of learning outcomes. For example, what are the substantive areas of law in which a student must be competent upon graduation? For some that would include international law while others would not identify that area. Others might focus on trusts and estates as a core area of knowledge while still others would not see this area as critical to all students. For institutions actually engaged in the process contemplated by the proposed ABA standards, getting into this level of detail will be a necessary part of the endeavor. For present purposes, however, we can remain at a comfortable level of generality.

20. Proposed Standard 303(a) addresses this issue. It begins as follows: "A law school shall offer a curriculum that is designed to produce graduates who have attained competency in the learning outcomes identified in Standard 302" July 2012 Draft, *supra* note 13, at 15.

21. The importance of various forms of assessment is also supported by the educational research in this area. *See, e.g.*, STUCKEY ET AL., *supra* note 7, at 235–73; SULLIVAN ET AL., *supra* note 6, at 162–84.

22. July 2012 Draft, *supra* note 13, at 18. A formative assessment technique is one used at various points in a course designed to provide feedback to students in order to improve student learning. Proposed Interpretation 307–1, *id.* A summative assessment is one utilized "at the culmination of a particular course or the culmination of any part of a student's legal education that measures the degree of student learning." *Id.* A good example of a formative assessment technique is the submission of draft analytical writing during a course for which the professor provides constructive criticism. A summative assessment would be something akin to the

The other form of assessment contemplated under the proposed ABA Standards is at a broader level. It addresses whether the institution's curriculum as a whole is achieving the learning objectives of that institution.²³ Specifically, Proposed Standard 308 provides:

The dean and faculty of a law school shall conduct ongoing evaluation of the law school's learning outcomes, program of legal education, and assessment methods; and shall use the results of this evaluation to determine the degree of student attainment of competency in the learning outcomes and to make appropriate changes to improve the curriculum.²⁴

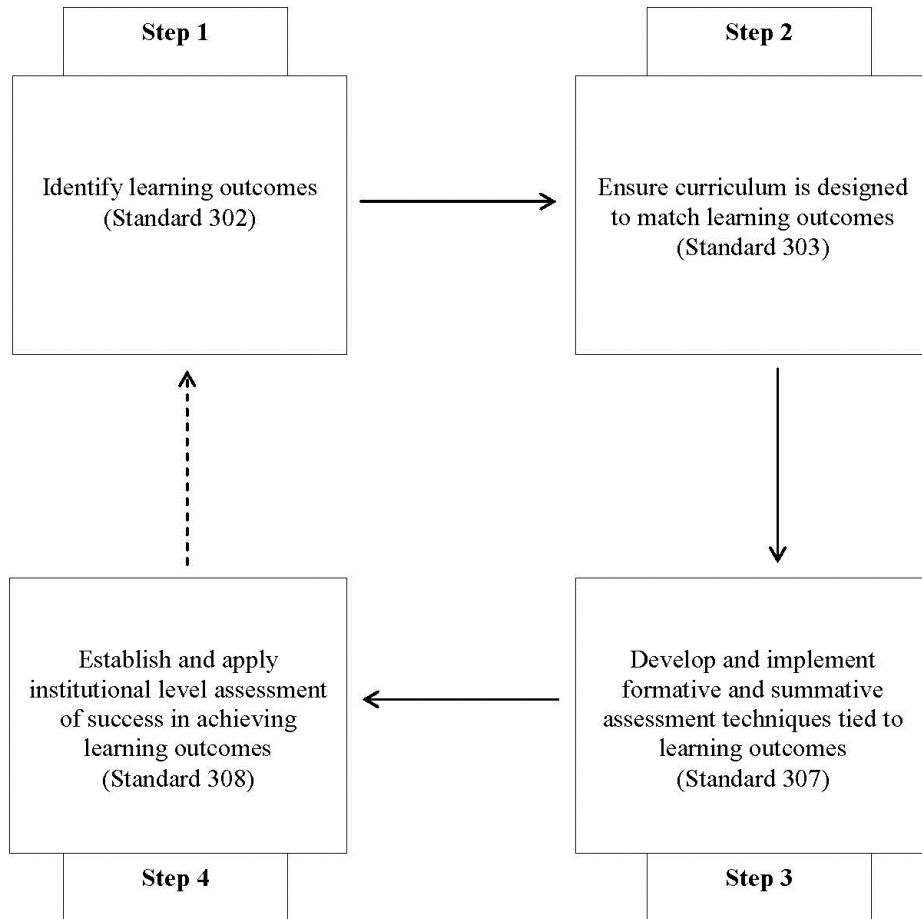
Proposed Standard 308 actually accomplishes two purposes. Most directly, it requires the institution to consider the success of its program of legal education on the basis of the "forest" and not solely on the basis of the "trees" of the individual student. In addition, it contemplates that the Standard 308 assessment will serve as a means to, in some sense, begin the process anew by reconsidering whether the identified learning outcomes and the institution's curriculum should be altered given the results of the institutional assessment. I have provided a visual representation of the cycle of curricular assessment under the proposed ABA Standards in the figure below:

traditional end of semester final exam. These are merely examples of devices that could fit into these two groups of assessment techniques.

23. Proposed Standard 308, *id.* at 19.

24. *Id.*

The Curricula Assessment Cycle



By this point, it should be clear how a capstone course can assist a law school in complying with the proposed ABA Standards as well as address in some measure the broader critiques levied against legal education.²⁵ Recall that my conception of a capstone experience in the context of legal education is one that brings together a large number of experiences that in some collective sense represent what a student should have learned and experienced over the course of his or her legal studies.²⁶ Conceived of in this way, a capstone experience appears to be an important means of the type of institutional assessment contemplated by Proposed Standard 308.

Assume solely for illustrative purposes that a given institution has identified as learning outcomes that a student upon graduation will (1) have a sound understanding of the *Federal Rules of Evidence* and the substantive law of criminal procedure and (2) be able to competently represent a client in a simple criminal law matter. Given these learning outcomes, having a capstone experience requiring students to successfully complete participation in either a prosecution or public defender clinic would be an excellent capstone experience in the sense of evaluating whether the institution's curriculum had, on some global level, achieved its identified learning objectives. It is for this reason, perhaps, that the ABA has indicated that an appropriate capstone experience is one of the means by which an institution can establish that it is in compliance with Proposed Standard 308.²⁷

Having described the learning environment in which law schools find themselves today and also how a capstone experience, properly designed, can play an important role in that environment, the next Section turns to Remedies in particular. It explains how the Remedies course can play a significant role in how law schools navigate the rapidly changing currents of this educational environment.

25. Of course, a capstone course can only be used to address these broader critiques to the extent that the learning outcomes of an institution themselves address these critiques. As I mentioned above, that broader question is beyond the scope of this Essay. I will proceed on the working assumption that the learning outcomes an institution has identified are consonant with the production of competent and ethical lawyers.

26. See *supra* text accompanying note 12.

27. Proposed Interpretation 308–2, July 2012 Draft, *supra* note 13, at 19 (providing in part that “[t]he following methods, when properly applied and given appropriate weight, are among the acceptable methods to measure the degree to which students have attained competency in the school’s student learning outcomes: . . . student performance in capstone courses or other courses that appropriately assess a variety of skills and knowledge”).

II. REMEDIES AS A CAPSTONE EXPERIENCE

The Remedies course is a truly wonderful educational experience.²⁸ As a candidate for a teaching position many years ago, I distinctly recall sitting in the then-associate dean's office during an interview. She asked me whether I would be comfortable teaching a course in Remedies. I had spent almost nine years in a complex civil litigation practice at that point, so I felt comfortable saying "yes" truthfully.²⁹ But I soon learned that I was mistaken in a fundamental sense. Remedies as a course—and as a field of study—is immensely complex. The area covered by Remedies is so vast and so rich that it is a challenge to teach as well as to study. But as I discuss below, it is precisely these characteristics of Remedies that makes it so well suited as a capstone experience.³⁰

One of the distinguishing features of Remedies is that it is a course that cuts across many substantive areas of the curriculum.³¹ It does so in many ways. First, the course deals with issues that can justifiably be termed both procedural and substantive.³² Second, it addresses a host of "substantive" topics including contracts, torts, constitutional law, and intellectual property

28. For an interesting and comprehensive study of how the modern Remedies course developed in the United States, see Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161 (2008).

29. Of course, as anyone who has gone through the law school hiring process knows, the answer to this question is not at all dependent on the subject matter. I confess that I would likely have answered "yes" even if the subject had been Mongolian horse law!

30. Others have noted this aspect of Remedies. For an interesting discussion of this aspect of the course, see Russell L. Weaver & David F. Partlett, *Remedies as a "Capstone" Course*, 27 REV. LITIG. 269 (2008).

31. It should be noted here that because of the breadth of the subject matter, there are many ways in which one can teach a course in Remedies. No matter how it is taught, however, the course spans a wide range of issues.

32. For example, a Remedies course will often consider procedural matters such as the steps that must be taken to obtain interlocutory injunctive relief. See, e.g., DOUG RENDLEMAN & CAPRICE L. ROBERTS, REMEDIES: CASES AND MATERIALS 330–69 (8th ed. 2011) (discussing "Injunction Procedure"). At the same time, the course considers the substantive basis on which the doctrine of unjust enrichment allows recovery. See, e.g., *id.* at 469–525 (discussing substantive doctrines of unjust enrichment).

(and the list goes on).³³ Finally, it spans the gap between public law and private law, to the extent one sees a gap in this area.³⁴

In addition to these features of the course, Remedies also has other facets that make it useful as a comprehensive means of assessing learning outcomes. For example, decisions about what remedies to seek in a given context require lawyers to truly engage with their clients. While the law provides for what remedies are available, only a dialogue with the client can establish which of these remedies will be a goal in a certain case.³⁵ In addition, more systemic decisions about the remedies that are available for a given wrong require students (as well as lawyers and other policymakers) to wrestle with the ultimate aims of the civil justice system. In sum, the Remedies course is fertile ground for discussions that are at the core of what lawyers need to do with respect to both their clients and our legal system as a whole.

In the balance of this Section, I describe some specific means by which one can use the Remedies course as a capstone experience. Because the use of any capstone course is tied to the learning outcomes that are desired, I will use the generic learning outcomes I mentioned above as organizing principles.³⁶ The details of how the Remedies course could be used as an assessment tool would vary with the particular learning outcomes at issue. However, the principle remains the same. As a recap, the generic learning outcomes I will use to organize the following discussion are: (1) possessing certain substantive knowledge about the law; (2) having core abilities concerning legal communication and analysis; (3) attaining the practical skills necessary to advise and represent clients, particularly including the ability to identify and present solutions to problems; and (4) appreciating the important role of lawyers and the law in our system of justice and society more generally.

33. My own teaching experience is representative of this fact. In my Remedies course I discuss the following cases almost every semester: *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (standards for injunctive relief in patent infringement actions); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (limits on punitive damages under the Constitution's Due Process Clause); *Neri v. Retail Marine Corp.*, 285 N.E.2d 311 (N.Y. 1972) (contract remedies under the Uniform Commercial Code); *Debus v. Grand Union Stores of Vt.*, 621 A.2d 1288 (Vt. 1993) (appropriate jury arguments in personal injury tort cases).

34. A leading Remedies textbook makes this point plain in its title, recognizing the reality that whether a lawsuit concerns a breach of contract or a claim of racial discrimination in public education, the remedy will always be a concern. See DAVID I. LEVINE, DAVID J. JUNG & TRACY A. THOMAS, *REMEDIES: PUBLIC AND PRIVATE* (5th ed. 2009).

35. As one lawyer noted in discussing the importance of client interviews: "Listen to the client's story. . . . [L]istening to the full story will help you understand the client's goals." Lawrence J. Vilardo, *Communicating with Clients*, LITIG., Spring 2001, at 45, 45. The same essential point is reflected in the *Model Rules of Professional Conduct*. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . .").

36. See *supra* text accompanying note 19.

Substantive Knowledge

As mentioned above, Remedies is a course that spans much of the traditional law school curriculum as far as substantive content is concerned.³⁷ While the numerous books used as texts for the course vary in terms of how they present the material, no matter what text is used, the course allows one to review and expand upon many of the substantive and procedural concepts to which students should have been exposed earlier in their law school education. For this reason alone, Remedies is ideally suited for a capstone experience to assess a learning outcome tied to substance.

There are so many wonderful books in the field of Remedies. When I started teaching, I selected Professor Laycock's text, and I have taught from its various editions over the past twelve years.³⁸ Much of the discussion that follows will rely on material in Professor Laycock's work, but one could replicate this discussion with little difficulty by focusing on the other books in this area.

If one's goal is to assess whether students have achieved a certain level of proficiency in a wide range of areas of the law, Remedies is an excellent means to do so. I will use Professor Laycock's book, which he divides by remedy as opposed to substantive area of the law, as an illustration. The first remedy he discusses is the one that is perhaps most familiar to students: compensatory damages.³⁹ In the context of this discussion, in addition to matters specifically focused on remedial concepts, a student is exposed to a review of basic matters related to contracts,⁴⁰ torts,⁴¹ constitutional law,⁴² and property,⁴³ among others. While there is no way in which one can review every concept addressed in entire courses on other areas of substantive law, the fact that a Remedies course addresses all of these substantive domains in one form or another provides a means by which one can assess a student's substantive knowledge at least in some respect.⁴⁴ And if one engages with this assessment task

37. See *supra* notes 32–34 and accompanying text.

38. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS (4th ed. 2010).

39. See *id.* at 11–216.

40. See *id.* at 35–37 (presenting *Neri v. Retail Marine Corp.*, 285 N.E.2d 311 (N.Y. 1972)).

41. See LAYCOCK, *supra* note 38, at 102–05 (presenting *Pruitt v. Allied Chemical Corp.*, 523 F. Supp. 975 (E.D. Va. 1981)).

42. See LAYCOCK, *supra* note 38, at 181–84 (presenting *Carey v. Piphus*, 435 U.S. 247 (1978)).

43. See LAYCOCK, *supra* note 38, at 28–31 (presenting *Trinity Church v. John Hancock Mut. Life Ins. Co.*, 502 N.E.2d 532 (Mass. 1987)).

44. In addition, it is possible for a professor to tailor parts of the class to address more regionally-specific areas of the substantive law. For example, I ask my students to read a case about Florida's articulation of the economic loss rule. See *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004). Doing so helps me assess a goal concerning

consciously, the course becomes an even more effective tool for addressing learning outcomes tied to substantive law.

The Remedies course also allows one to assess a student's understanding of more general principles of law. These more general concepts are not tied to any particular substantive area of law. However, they are substantive concepts that could certainly be among an institution's learning outcomes. For example, it is almost certainly the case that we want our students to understand how to apply statutes and how those statutes interact with common law concepts. In other words, we are concerned with an ability to navigate the regulatory state.

Again using compensatory damages as an example, a Remedies course provides a vehicle by which to reinforce students' abilities to read and apply statutes and to assess whether students have sufficiently grasped these skills. When a professor teaches about the *Uniform Commercial Code* in Remedies, she not only reinforces the substantive law of contracts for the sale of goods; she also can use the exercise to reinforce and assess a school's learning objectives concerning statutes.⁴⁵ And the same could be said if a professor focused on other concepts with a strong statutory component.⁴⁶

Finally, with respect to a learning outcome focused on substance, Remedies provides a means by which an institution could assess whether students have attained the desired level of competency with respect to working with evolving concepts in the law. Two examples make the point from widely different areas addressed in Remedies.

The first example in this regard concerns the standards by which a party in a federal court proceeding may obtain a permanent injunction. In *eBay Inc. v. MercExchange, L.L.C.*,⁴⁷ the Supreme Court of the United States stated the following:

According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted;

substantive knowledge of Florida law while also allowing me to explore the broader context of the interaction of tort and contract law.

45. See, e.g., LAYCOCK, *supra* note 38, at 35–50 (discussing two cases under the UCC and contrasting these statutory principles with common law concepts). One also can use geographically specific law here as well. For example, I require my students to read and apply the remedies section of Florida's version of the UCC. See FLA. STAT. §§ 672.701–.724 (2012).

46. For example, I spend a fair amount of time working with Florida's various statutes concerning the award of punitive damages. See FLA. STAT. §§ 768.72–.73, 768.735–.737.

47. 547 U.S. 388 (2006).

and (4) that the public interest would not be disserved by a permanent injunction.⁴⁸

This statement seems clear enough. The problem, however, is that “[r]emedies specialists had never heard of the four-point test.”⁴⁹ For whatever reason, the Supreme Court separated elements (1) and (2) into two distinct elements. Before that time, I can say with some confidence that the requirements of irreparable harm and no adequate remedy at law were seen as essentially two sides of the same coin.⁵⁰ My point here is not to critique the Court. Rather, *eBay* provides a wonderful opportunity to explore with students how to deal with changes courts may inject from time to time in what appeared to be well-established law. The fact that I cannot tell students the “answer” in terms of how irreparable harm differs from no adequate remedy at law helps to underscore for them the reality that the law is not black and white. And it also allows me to assess how well students have developed the skills of dealing with such changes in the law.

A similar point concerns the recently completed *Restatement (Third) of Restitution and Unjust Enrichment*.⁵¹ Section 39 of the *Restatement (Third)* provides in part as follows: “If a deliberate breach of contract results in profit to the defaulting promisor and the available damage remedy affords inadequate protection to the promisee’s contractual entitlement, the promisee has a claim to restitution of the profit realized by the promisor as a result of the breach.”⁵² Even to begin to explore the contours of this rule concerning so-called “opportunistic” breaches of contract is beyond the scope of this Essay.⁵³ What is clear to me, however, is that Section 39 has the potential to provide advocates with a powerful tool by which to capture a greater recovery for their clients in breach of contract actions.

Take just a simple example of why this is so. Assume *A* and *B* enter into a contract whereby *B* will provide chairs to *A* for \$5,000. *B*’s profit on this contractual transaction will be \$2,000. Now further assume that *C* approaches *B* and asks *B* to make tables for *C*. *C* will pay \$10,000 for the tables and *B* will make a \$6,000 profit on the tables. *B* cannot do both jobs. *B* knows that if *A* has to go on the open market for the chairs, *A* will have to pay \$6,000. If *B* breaches the contract with *A*, *B* will be responsible for damages, which would

48. *Id.* at 391.

49. Doug Rendleman, *The Trial Judge’s Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 76 n.71 (2007).

50. See LAYCOCK, *supra* note 38, at 426–27 (discussing the confusion created by *eBay*).

51. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2011).

52. *Id.* § 39(1).

53. For a discussion of this Section of the *Restatement (Third)*, see Caprice L. Roberts, *Restitutionary Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages*, 42 LOY. L.A. L. REV. 131 (2008).

be the difference in cover or \$1,000 (\$6,000 less the \$5,000 contract price—and, of course, any incidental damages *A* suffered that I will ignore here). *B* would rationally conclude it should breach the contract since it would be better off breaching and paying *A* so that *B* could enter into the contract with *C*. Why? *B* would make a profit of \$6,000 on that contract. It would then pay the \$1,000 in damages to *A*. But its net profit of \$5,000 would still be better than what it would have made on the contract with *A*. This is the classic description of the “efficient breach.”⁵⁴ But if Section 39 were read to say that *A* could elect to proceed to recover *B*’s increased profit on this breach instead of just the \$1,000 cover cost, that would be significant. I am not necessarily saying that Section 39 will be—or should be—read to lead to this result.⁵⁵ However, it is precisely the option of making this argument that makes this Section of the *Restatement (Third)* such a powerful teaching tool. It is also a very good capstone assessment technique if one of an institution’s learning objectives is the ability to work with changes (or potential changes) in the substantive law.

My point in this discussion about substantive assessment is not that any single class can accomplish all of the learning objectives associated with obtaining a body of substantive legal knowledge. That is quite literally impossible since that is, fundamentally, what the full course of legal study is designed to do (at least in part). But if one has the opportunity to have an educational experience that provides a vehicle by which to touch on many of the areas of substantive knowledge we would like our students to possess, one is in a good position to assess whether this aspect of institutional learning outcomes has been achieved. I submit that Remedies provides such a vehicle.

Legal Communication and Analysis

In addition to providing a course that touches on many substantive areas of law, Remedies also is a nice vehicle for assessing a student’s abilities concerning legal communication and analysis. Here, I confess that there is nothing particularly special about Remedies. As long as a professor had the goal to assess legal communication and analysis, she could do so in almost any course given sufficient planning and allocation of resources. The professor could assign writing exercises, for example, as a means of assessing this particular learning outcome.

54. See, e.g., *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1289 (7th Cir. 1985) (discussing and providing examples of an efficient breach of contract scenario in the context of liquidated damages provisions contained in agreements).

55. For example, the Section purports to limit its general rule by explaining that damages will “ordinarily” be inadequate when they “will not permit the promisee to acquire a full equivalent to the promised performance in a substitute transaction.” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39(2) (2011).

What does distinguish Remedies with respect to assessment of this learning outcome brings us back to the comprehensive nature of the course. If a professor had a goal to assess a student's analytical abilities over the range of law school—what is implicit in Proposed ABA Standard 308⁵⁶—what better way to do so comprehensively than with a course that cuts across the curriculum?

Practical Lawyering Skills

If one is interested in doing so, the Remedies course also provides an excellent means by which to assess many of the practical lawyering skills that an institution might wish to have its students possess at the end of their course of study. In this sub-section, I will briefly discuss the ways in which a Remedies course can serve this purpose.

Something that all lawyers need to have is the ability to counsel clients. It is difficult to conceive of a position in which one serves as an attorney that would not require counseling. Counseling in turn encompasses a wide array of skills ranging from understanding the substantive law, investigating or determining the relevant facts, and, perhaps most underappreciated, listening to the client's needs and goals. If one is inclined to do so, the Remedies course provides many vehicles in which to assess these skills. I outline two examples in rather different contexts.

Professor Laycock's text begins substantively with *United States v. Hatahley*.⁵⁷ That case concerned a claim by several Native Americans related to the confiscation and destruction by the United States of their horses and burros.⁵⁸ The case is a wonderful vehicle for canvassing many of the issues that Professor Laycock explores in greater detail in the balance of his chapter on compensatory damages. But it is also a means to discuss more general concepts and skills related to client counseling. I will often play the role of the Native American client and ask a student to play the role of a lawyer whom I am consulting. I use the facts of the case as a starting point to explore the types of questions that a lawyer should ask the client. For example, we explore what was the impact of the wrong on the client. I also make clear that sometimes everything in litigation is a second best outcome because what the client really wants is the horse back. The law can't make that happen. Over the past decade, I have found this exercise to be an excellent means of starting the assessment process with respect to the skills associated with client counseling.

Later in the semester, I use another case in Professor Laycock's book to assess the same skill sets related to client counseling. This time, I focus on a

56. See *supra* Section I (discussing proposed ABA Standards).

57. LAYCOCK, *supra* note 38, at 11–14 (excerpting *United States v. Hatahley*, 257 F.2d 920 (10th Cir. 1958)).

58. *Hatahley*, 257 F.2d at 921.

purely private law case, *Winston Research Corp. v. Minnesota Mining & Manufacturing Co.*⁵⁹ In *Winston*, the plaintiff claimed that one of its former employees had started a company (Winston) and was using proprietary information to make a tape-recording system to compete with the one the plaintiff manufactured.⁶⁰

I ask a student to play the role of a lawyer. I play the role of the corporate plaintiff's president. We use the classroom discussion to play out the initial discussion that would take place here. While the case is presented in the Laycock text to explore the concept of the appropriate scope of the injunction,⁶¹ I find that it is equally useful to assess how well students have internalized the basics of client counseling. The fundamental point is that there are many cases in the Remedies canon that allow one to assess client counseling skills and to do so over a wide range of substantive legal doctrines.

The same can be said of Remedies and assessing the skill of problem-solving. Of course, saying that lawyers need to be able to solve problems is perhaps the classic example of a truism. Yet, one thing about truisms is that they are true. If a law school says that it will produce graduates who are able to solve legal problems, it is critically important to have a means to assess whether this goal has been accomplished. Because of the nature of Remedies in terms of the substantive areas of the law, it is a natural means by which to assess problem-solving skills.

Finally, as an illustration of the way in which substantive skills can be assessed in connection with a Remedies course, the class is an excellent means to assess legal drafting. What makes Remedies so useful in this regard is, again, that the substantive content of the course is so comprehensive. Over the time I have taught the course, I have had students draft a wide array of legal documents including: (1) memoranda to clients concerning options for legal action; (2) contract provisions dealing with excluded or specified remedies (including liquidated damages provisions); (3) statutory provisions (for example those dealing with so-called tort reform measures); and (4) injunctive provisions. The fundamental point is that the comprehensive nature of the Remedies course allows a faculty member to assess a student's proficiency at legal drafting, assuming that this is a skill an institution has decided a student should possess upon graduation.

59. LAYCOCK, *supra* note 38, at 300–03 (excerpting *Winston Research Corp. v. Minnesota Mining & Manufacturing Co.*, 350 F.2d 134 (9th Cir. 1965)).

60. *Winston*, 350 F.2d at 136.

61. See LAYCOCK, *supra* note 38, at 303–04 (presenting notes following case discussing the appropriate scope of the injunction).

The Importance of Lawyers in Our System of Justice and of the Law in Society

The last point to consider (based on my generic assessment of learning outcomes) is assessment concerning an understanding of the importance of lawyers in the context of our system of justice and of the law in society more generally. The fact of the matter is that lawyers do make a difference in the world, and our students need to understand that this is the case. Again, based on my experience, Remedies provides an excellent means of making this assessment. I provide two examples to make this point.

Let's take perhaps the obvious example first. When one discusses litigation concerning either school desegregation⁶² or prisoner litigation,⁶³ there is no way to avoid a discussion of the role of a lawyer in enforcing constitutional rights. How could one teach any of the school desegregation cases without discussing the role of lawyers such as Thurgood Marshall? And this discussion also let's one explore—and reinforce—the limits of law alone to affect society. If an institution has as one of its goals to inculcate in students an appreciation for the role of lawyering in social change, Remedies provides a means by which to assess how well it has accomplished this goal through a student's course of study.

The course also allows one to accomplish this task with a more recent example that has likely had a more direct impact on many of our students. I spend a fair amount of time exploring the work of Special Master Ken Feinberg in connection with the September 11th Victim Compensation Fund.⁶⁴ September 11th was an event that students remember well. They know that it has had implications for their own lives. I use that event for several purposes. One of them is substantive. The choices Special Master Feinberg made at times mirrored those of the torts system⁶⁵ but also at times deviated from "normal" tort principles.⁶⁶

62. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

63. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910 (2011).

64. The Fund was established by Congress as a means to provide compensation to victims of the terrorist attacks. In sum, a victim could participate in the Fund and receive compensation without establishing fault. However, to do so, the victim would need to forego litigation except as to the terrorists themselves. See 49 U.S.C. § 40101 note sec. 405(c)(3)(B)(i) (2006). For further commentary concerning the Fund, see Symposium, *After Disaster: The September 11th Compensation Fund and the Future of Civil Justice*, 53 DEPAUL L. REV. 205 (2003).

65. As a simple example, a claimant was able to recover both economic and non-economic damages as they would have been able to do in the court system.

66. For example, as a general matter in the tort system, pain and suffering damages are individualized in that each plaintiff must establish his or her pain and suffering damages separately. See, e.g., *United States v. Hatahley*, 257 F.2d 920, 925 (10th Cir. 1958) ("Pain and suffering is a personal and individual matter, not a common injury, and must be so treated."). The Special Master took a very different view. He determined that a single amount for pain and suffering would be awarded to each person who was injured in the attacks and a separate amount would be awarded for those who had died. See LAYCOCK, *supra* note 38, at 150.

My other purpose is broader than reinforcing or assessing substantive law principles. The Special Master's work also allows me to discuss the role of law generally, and remedial law in particular, in achieving certain goals. By this point in the course, we have been engaged in determining how the law sets damages in most cases. The basic principle is to award an amount of money necessary to put the plaintiff in the position in which she was prior to the defendant's wrong, in other words, compensation.⁶⁷ Did the Special Master follow this principle?

It is difficult to view the Special Master's work overall without concluding that he was engaged in more than simply compensating victims. It appears that he imposed something of a cap on economic damages for high wage earners while he set a floor for low wage earners.⁶⁸ If this is the case, one can view the Special Master as engaging in a form of distributive justice, a goal in which the decision maker is not concerned only with placing the victim in the position she would have been in without the harm, but also with the "fairness" of that position more broadly.⁶⁹ While this Essay is not the place to engage in a discussion of whether, in fact, the Special Master engaged in this activity or whether doing so would be appropriate, one can see that the Fund provides a wonderful opportunity to discuss these issues with students. They will hopefully have been exposed to such concepts earlier in their legal educations, so Remedies can reinforce those earlier experiences.

I could provide additional examples of how one could use Remedies to reinforce and assess an understanding and appreciation of a lawyer's (or the law's) importance in society. No doubt, others would disagree with some of these illustrations and/or identify other examples of their own. But I believe there is no question that the Remedies course provides fertile ground as a capstone experience with respect to this educational goal.

CONCLUSION

To use a common phrase, much of what I have said in this Essay is not rocket science. After explaining the legal environment in which we find

67. See LAYCOCK, *supra* note 38, at 14.

68. See *id.* at 150–51.

69. There are many conceptions of distributive justice. As an overall matter, principles of distributive justice provide "moral guidance for the political processes and structures that affect the distribution of economic benefits and burdens in societies." Julian Lamont & Christi Favor, *Distributive Justice*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/justice-distributive/> (last updated Oct. 30, 2012). Perhaps the most famous modern articulation of distributive justice principles can be found in JOHN RAWLS, *A THEORY OF JUSTICE* (1971). For a specific discussion of distributive justice principles in connection with the work of the September 11th Special Master, see Brian H. Bornstein & Susan Poser, *Perceptions of Procedural and Distributive Justice in the September 11th Victim Compensation Fund*, 17 CORNELL J.L. & PUB. POL'Y 75 (2007).

ourselves, I outlined the ways in which the Remedies course, an educational experience already covering a number of substantive legal areas, could be used as a means of addressing some of the challenges we are facing. But the fact that these observations are not earth-shattering should not take away from the point. I have come to believe that the true fundamental problem in American legal education is a resistance to change as almost a knee-jerk reaction. This is the beginning of a path to nowhere.

We are at a crossroads in legal education. We can reject all criticisms of what we do. We can fight the ABA's efforts to establish standards to judge whether law schools are producing graduates who possess the knowledge, skills, and values we expect. But we could also embrace these developments and use them as means to make our students' educational experiences better. One approach likely makes us dinosaurs. The other makes us innovators. At the end of the day, the choice is ours.

Utilizing Remedies as I have discussed is not the only means by which legal educators can craft capstone experiences. Other courses can serve this purpose if conscious thought is put into the structure of the class. I contend that Remedies is especially well suited for this purpose, but I don't believe it is unique. Whatever the means, however, we need to decide how we will assess whether our students have learned what we want them to learn.